Court File No.: CV-24-00712366-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUMBLE & FUME INC. (ONTARIO), HUMBLE & FUME INC. (MANITOBA), BOB HEADQUARTERS INC., FUME LABS INC., HUMBLE CANNABIS SOLUTIONS INC., PWF HOLDCO INC., and WINDSHIP TRADING LLC

Applicants

FACTUM OF THE APPLICANTS
(Approval and Vesting Order)

(Returnable March 7, 2024)

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PART I - INTRODUCTION

1. On January 5, 2024, the applicants Humble & Fume Inc. ("**Humble Parent**"), Humble & Fume Inc. (Manitoba) ("**Humble Manitoba**"), B.O.B. Headquarters Inc. ("**BOBHQ**"), Humble Cannabis Solutions Inc. ("**HCS**"), Fume Labs Inc. ("**Fume Labs**"), PWF Holdco Inc. ("**PWF**"), and Windship Trading LLC ("**Windship**", collectively, the "**Applicants**") brought an application to the Court for, among other things, protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("**CCAA**").

2. The Applicants distribute cannabis accessories in Canada and the United States. The Applicants applied for and obtained urgent relief under the CCAA on January 5, 2024 because they had insufficient capital to sustain operations on a go-forward basis.

3. This factum is filed by the Applicants in support of the Applicants' motion for three orders:

   (a) an order ("**Approval and Vesting Order**"), substantially in the form of the draft order at **Tab** "**3**" to the Motion Record, among other things:

(i) approving the stalking horse purchase agreement entered into between Humble Parent, as vendor, and 1000760498 Ontario Inc. (the "**Purchaser**") dated as of January 23, 2024, as amended and restated on March 5, 2024 (the "**Purchase Agreement**");

(ii) authorizing and directing the Applicants to perform their obligations under the Purchase Agreement and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction (as defined in the Purchase Agreement);

(iii) transferring and vesting all of the Applicants' right, title, and interest in and to the Excluded Assets and Excluded Liabilities (as defined in the Purchase Agreement) to and in a corporation to be incorporated ("**ResidualCo**");

(iv) removing the Applicants as applicants in these CCAA proceedings in order to effect the Transaction;

(v) vesting in the Purchaser or its nominee all of the right, title and interest in and to the Post-Consolidation Shares (as defined in the Purchase Agreement) free and clear of all Encumbrances, other than Permitted Encumbrances (as defined in the Purchase Agreement), upon the filing of a certificate by the Monitor substantially in the form attached Schedule "A" to the draft Approval and Vesting Order (the "**Monitor's Certificate**");

(vi) granting certain enhanced powers to the Monitor in respect of ResidualCo;

(vii) approving the releases (the "**Parent Releases**") provided for in the Purchase Agreement in favour of the officers and directors of the Applicants as of

January 5, 2024 (the date of the Initial Order), its advisors, the Monitor and the Monitor's counsel (the "**Parent Released Parties**");

(viii) declaring that pursuant to subsections 5(1)(b)(iv) and 5(5) of the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s.1 ("**WEPPA**"), Humble Parent meets the criteria prescribed by section 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 ("**WEPP Regulation**") and Humble Parent's former employees are eligible to receive payments in accordance with the WEPPA; and

(ix) sealing the confidential appendix to the second report (the "Monitor's Second Report") of Deloitte Restructuring Inc., (the "**Monitor**") in its capacity as court-appointed Monitor; and

(b) an order (the "**BOB Approval and Vesting Order**" and together with the Approval and Vesting Order, the "**Vesting Orders**"), substantially in the form of the draft order at **Tab** "**4**" to the Motion Record, among other things:

(i) authorizing and directing Humble Manitoba and BOBHQ to perform their obligations under the Purchase Agreement with respect to the BOB Transaction (as defined in the Purchase Agreement) and to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the BOB Transaction;

(ii) transferring and vesting all of BOBHQ's right, title, and interest in and to the Excluded BOB Assets and Excluded BOB Liabilities (as defined in the Purchase Agreement) to and in a corporation to be incorporated

("**ResidualCo**");

(iii) adding ResidualCo as an applicant to these CCAA proceedings and removing BOBHQ as an applicant in these CCAA proceedings in order to effect the Transaction;

(iv) vesting in the Purchaser or its assignee or nominee all of the right, title and interest in and to the BOB Shares (as defined in the Purchase Agreement) free and clear of all Encumbrances, other than Permitted Encumbrances (as defined in the Purchase Agreement), upon the filing of a certificate by the Monitor substantially in the form attached Schedule "A" to the draft BOB Approval and Vesting Order (the "**BOB Monitor's Certificate**");

(v) granting enhanced powers to the Monitor in respect of ResidualCo; and

(vi) approving the releases (the "**BOB Releases**" and together with the Parent Releases, the "**Releases**") provided for in the Purchase Agreement in favour of the officers and directors of BOBHQ as of January 5, 2024 (the date of the Initial Order), its advisors, the Monitor and the Monitor's counsel (the "**BOB Released Parties**" and together with the Parent Released Parties, the "**Released Parties**"); and

(c) an order (the "**Termination Order**"), substantially in the form of the draft order at **Tab** "**5**" to the Motion Record, among other things:

(i) approving the fees and activities of the Monitor, and the fees of the Monitor's counsel, as set out in the Monitor's Second Report; and

(ii) terminating these CCAA proceedings and discharging the Monitor upon

completion of the proposed transactions and filing of a termination and discharge certificate (the "**Termination and Discharge Certificate**").

4. The Transaction and the BOB Transaction (together, the "**Transactions**") are structured as separate reverse vesting orders ("**RVO**s") whereby the Purchaser will receive all of the issued and outstanding shares of Humble Parent and of BOB free and clear from all Claims and Encumbrances, with the exception of Permitted Encumbrances.

5. The RVO structure is necessary to preserve the going-concern value of the Applicants' business. The structure preserves Humble Parent's status as a reporting issuer; preserves over $39 million in tax losses; avoids triggering change of control provisions in a valuable downstream foreign investment; avoids the expense and inefficiency of seeking consents to assign contracts; and otherwise preserves going concern value while maintaining employee jobs and associated economic activity, including important supply and distribution relationships.

6. The Purchase Agreement and the Transactions provide the best outcome for the Applicants' creditors in difficult circumstances. The Transactions represent the highest and best offer generated through a Court-approved and Monitor-implemented SISP. The SISP, and its "stalking horse sale process" component, was approved by the Court and was broadly supported by creditors.

PART II - THE FACTS

7. The facts underlying this motion are more fully set out in the in the affidavit of Jakob Ripshtein sworn March 4, 2024 (the "**Fifth Ripshtein Affidavit**") and in the affidavits of Jakob Ripshtein sworn January 4, 2024 (the "**First Ripshtein Affidavit**") and on January 23, 2024 (the "**Third Ripshtein Affidavit**"). Capitalized terms not otherwise defined

herein shall have the meaning prescribed to them in the Fifth Ripshtein Affidavit, unless otherwise indicated.

A. Background

8. On January 5, 2024 the Honourable Justice Cavanagh granted an initial order under the CCAA. On January 26, 2024 Justice Cavanagh granted a second amended and restated initial order (the "**Second Amended and Restated Initial Order**"). Further particulars of the Second Amended and Restated Initial Order are set out at paragraphs 12 and 13 of the Fifth Ripshtein Affidavit.

9. On January 24, 2024 Justice Cavanagh granted a SISP Approval Order that, among other things, (i) approved Humble Parent's execution of the Stalking Horse Bid between Humble Parent as vendor and the Purchaser as purchaser for the purpose of acting as a stalking horse bid and (ii) approved a sale and investment solicitation process ("**SISP**").[1]

B. Results of the SISP

10. The Applicants have worked closely with the Monitor and their advisors to implement the SISP in accordance with its terms.[2]

11. The Court-approved SISP is now complete.[3]

12. The Monitor's Second Report includes a comprehensive update on the implementation of the SISP and, at the Confidential Appendix, a summary of the various bids submitted.

13. The Applicants assisted the Monitor in preparing a list of 90 interested parties (the "**Known Potential Bidders**"). Beginning on January 29, 2024, in accordance with the SISP

[1] Fifth Ripshtein Affidavit at para 12(b), Tab 2 of the Motion Record.
[2] Fifth Ripshtein Affidavit at para 15, Tab 2 of the Motion Record.
[3] Fifth Ripshtein Affidavit at para 16, Tab 2 of the Motion Record.

timelines, the Monitor sent a solicitation letter (the "**Teaser Letter**") and a template non-disclosure agreement ("**NDA**") to the Known Potential Bidders. The list of Known Potential Bidders included, among other parties, Canadian and international private equity firms, cannabis accessories distributors, cannabis producers, and cannabis retailers.[4] The Monitor also advertised the SISP in the Insolvency Insider email newsletter.[5]

14. The Data Room went live on February 1, 2024. Throughout the SISP, a total of 11 Potential Bidders signed an ("**NDA**") and were consequently provided access to the Data Room.[6]

15. Shawn Dym, Matt Shalhoub, and Robert Ritchot (the "**Resigning Directors**") resigned their directorships with the Applicants on February 16, 2024, in advance of the conclusion of the SISP. Mr. Dym and Mr. Shalhoub are both associated with the Purchaser and resigned in advance of the Bid Deadline to avoid any appearance of conflict of interest. None of the Resigning Directors were involved in reviewing the received bids on behalf of the Applicants.[7]

16. Following the Bid Deadline of 5:00 pm (Toronto time) on February 23, 2024, the Monitor received bids from two Bidders (the "**Bids Submitted**"), in addition to the already existing Stalking Horse Bid.[8]

17. The Monitor, in consultation with the Applicants, considered the Bids Submitted and, in accordance with the SISP, determined that the Bids Submitted were not Qualified Bids. This is because the Bids Submitted did not include a cash purchase price in an amount

[4] Fifth Ripshtein Affidavit at para 19, Tab 2 of the Motion Record.
[5] Fifth Ripshtein Affidavit at para 20, Tab 2 of the Motion Record.
[6] Fifth Ripshtein Affidavit at para 21, Tab 2 of the Motion Record.
[7] Fifth Ripshtein Affidavit at para 22-23, Tab 2 of the Motion Record.
[8] Fifth Ripshtein Affidavit at para 24, Tab 2 of the Motion Record.

equal to or greater than the Stalking Horse Bid, plus $125,000, as required by the SISP.[9] The Monitor's summary of the Bids Submitted is found at the Confidential Appendix to the Monitor's Second Report.[10]

18. The Monitor therefore declared that the Stalking Horse Bid was the Successful Bid.[11]

19. Following the Monitor's determination that the Stalking Horse Bid was the Successful Bid, the Applicants, the Purchaser, and the Monitor elected to amend and restate the Stalking Horse Bid to create a two-stage closing.[12] This two-stage closing will allow the Purchaser to first acquire BOBHQ, with such transaction closing in advance of the Ontario Securities Commission's anticipated grant of a partial revocation of the cease-trade order in effect against Humble Parent.[13]

20. Other than moving to a two-stage closing, the basic terms of the Purchase Agreement are the same. The Purchase Price, the parties thereto, and the conditions to close remain unchanged.[14] The Monitor supports amending and restating the Stalking Horse Agreement into two closings and agrees that the transaction is fundamentally unchanged.[15]

21. The SISP was commercially reasonable, professionally run, and robust. It succeeded in generating buyer interest.[16]

[9] Fifth Ripshtein Affidavit at para 25, Tab 2 of the Motion Record.
[10] Confidential Appendix to the Monitor's Second Report.
[11] Fifth Ripshtein Affidavit at para 26, Tab 2 of the Motion Record.
[12] Fifth Ripshtein Affidavit at para 29, Tab 2 of the Motion Record.
[13] Fifth Ripshtein Affidavit at para 30-34, Tab 2 of the Motion Record.
[14] Fifth Ripshtein Affidavit at para 35, Tab 2 of the Motion Record.
[15] Fifth Ripshtein Affidavit at para 36, Tab 2 of the Motion Record.
[16] Fifth Ripshtein Affidavit at para 27, Tab 2 of the Motion Record.

PART III - ISSUES

22. The issues to be addressed before this Honourable Court are whether:

(a) the reverse vesting transaction should be approved;

(b) the Releases should be approved;

(c) ResidualCo should be added as an Applicant to these CCAA proceedings;

(d) the Monitor should be granted certain enhanced powers;

(e) the Confidential Appendix to the Monitor's Second Report should be sealed;

(f) the WEPP Declaration should be granted;;

(g) the Monitor's fees and activities should be approved; and

(h) these CCAA proceedings should be terminated upon the conclusion of the Transactions.

PART IV - LAW AND ARGUMENT

A. Reverse Vesting Transaction Should be Approved

i. *Section 36 Factors Support the Transaction*

23. The CCAA is flexible and is given a broad and liberal interpretation to achieve its objectives.[17] As such, a Court may approve a sale within the CCAA proceedings prior to or in the absence of a plan of compromise or arrangement.[18]

24. Section 36 of the CCAA provides that a debtor "may not sell or otherwise dispose of assets outside of the ordinary course of business unless authorized to do so by the court."[19] In

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[17] *Re Nortel Networks Corp.*, [2009] OJ No 2169 at para 47.
[18] *Re Nortel Networks Corp.*, [2009] OJ No 2169 at para 48.
[19] CCAA, s. 36(1).

considering whether to approve a sale, a court should consider, among other things:[20]

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved of the process leading up to the proposed sale;

(c) whether the monitor filed a report stating that the sale or disposition would be more beneficial to creditors than a sale or disposition in a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale on creditors and other interested parties; and

(f) whether the consideration to be received is reasonable and fair, taking into account their market value.

25. In *Harte Gold*, Justice Penny held that the s. 36(3) criteria largely correspond to the common law factors applied to the consideration of an asset sale in insolvency, articulated in *Royal Bank of Canada v Soundair Corp*.[21] In *Just Energy*, Justice McEwen held that where a s. 36(3) analysis supports a proposed transaction, *Soundair* is likely satisfied as well.[22]

26. The Applicants submit that the Purchase Agreement satisfies section 36(3) of the CCAA and the *Soundair* test and is in the best interest of the Applicants' stakeholders. The evidence, particularly the Monitor's analysis of the Sale Process, demonstrates that the Transaction represents the best option and outcome available in the circumstances.

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[20] CCAA, s. 36(3).
[21] *Royal Bank of Canada v Soundair Corp*., [1991] O.J. No. 1137, 4 OR (3d) 1.
[22] *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354, paras 32 and 62.

27. The process leading up to the Transaction was conducted by the Monitor and the Applicants in accordance with the court-approved. The process was, professionally run, commercially reasonable and robust.[23] The Monitor conducted comprehensive marketing efforts and broadly canvassed a wide network of potential purchasers.[24]

28. The Monitor is supportive of the Transaction and will file a report stating that in its opinion the assets were properly exposed to the marketplace and that the Purchase Agreement and the Transaction will maximize realizations available to creditors and other stakeholders.

29. The Applicants submit that the Purchase Agreement satisfies the test set out in section 36(3) of the CCAA and *Soundair*, and ought to be approved for the following reasons:

(a) The process leading to the Transaction was reasonable. The Transaction results from the SISP, which involved the Monitor and the Sales Agent contacting 90 potential strategic and financial buyers; broad, public notice of the opportunity; the execution of NDA's by 11 potential bidders; and bids submitted by two bidders in addition to the Stalking Horse Bid – all with a view to yielding the highest and best purchase price.[25]

(b) The Monitor approved of the process leading up to the proposed sale. The Monitor was involved in the design of the SISP and oversaw marketing the opportunity and due diligence of the business.[26]

(c) The Monitor believes that the Transaction will be more beneficial to creditors than a bankruptcy.[27]

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[23] Fifth Ripshtein Affidavit at para 27, Tab 2 of the Motion Record.
[24] Fifth Ripshtein Affidavit at para 19-20, Tab 2 of the Motion Record.
[25] Fifth Ripshtein Affidavit at para 19, 21, 24, Tab 2 of the Motion Record.
[26] Fifth Ripshtein Affidavit at para 19-20, Tab 2 of the Motion Record.
[27] Monitor's Second Report at para 27(c).

(d) Any creditor that has requested, has been included on the Applicants' service list. There is no suggestion in the record that any creditors were ignored or overlooked.

(e) The Transaction is the best available option for the Applicants' going-concern exit from these CCAA Proceedings. The Applicants' evidence, supported by the Monitor, is that the Transaction is in their best interests and those of their stakeholders and is the best and only available going-concern restructuring option.[28] The Transactions will preserve going-concern value, employment and associated economic activity, including important supply and distribution relationships.[29]

(f) The Purchase Price is fair and reasonable. The Purchase Price is the highest consideration offered for the Applicants' business and assets following the Applicants' and Monitor's good faith efforts in the SISP. No other bid matched the consideration offered in the Stalking Horse Bid.[30]

30. In light of the foregoing, the Applicants submit that the *Soundair* factors are also met: there was a sufficient effort to obtain the best price, the debtor has not acted improvidently, the interests of the parties have been properly considered, the process has been carried out with efficacy and integrity, and there is no unfairness in the circumstances.

ii. *Reverse Vesting Order is Appropriate*

31. The Court of Appeal for Ontario has noted that a vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear basis*, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds

[28] Fifth Ripshtein Affidavit at para 56, Tab 2 of the Motion Record.
[29] Monitor's Second Report at para 35.
[30] Monitor's Second Report at para 29.

generated by the sale transaction".[31] Absent vesting orders, the insolvency system "could not function in its present state".[32]

32. This is true because a "purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back".[33]

33. In a CCAA proceeding, a court has the power to vest assets free and clear of all encumbrances pursuant to section 11 of the CCAA and the inherent jurisdiction of the Court.[34] In Ontario, a court's power to grant a vesting order stems from section 100 of the *Courts of Justice Act*, R.S.O. c. C. 43 (the "**CJA**").[35] Pursuant to section 100 of the CJA, a court has the "power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity".[36]

34. In *Harte Gold Corp. (Re)* ("***Harte Gold***"), Justice Penny held that in determining whether to approve an RVO, it is appropriate to consider:[37]

(a) the statutory basis for an RVO and whether an RVO is appropriate in the circumstances; and

(b) the factors outlined in section 36(3) of the CCAA, with adjustment for the unique aspects of a reverse vesting transaction.

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[31] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 25.
[32] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508 at para 27.
[33] *Re Canadian Red Cross Society/Society canadienne de la Croix-Rouge*, [1998] OJ No. 3306 at para 42.
[34] *Re Canadian Red Cross Society/Society canadienne de la Croix-Rouge*, [1998] OJ No. 3306 at para 43.
[35] *Courts of Justice Act*, RSO 1990, c C 43, as amended, s. 100.
[36] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508 at para 27.
[37] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 23.

35. Justice Penny cautioned that approval of an RVO "should […] involve close scrutiny."[38] The debtor, purchaser and monitor should be prepared to answer the following questions:[39]

(a) why is an RVO necessary in this case?

(b) does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) is any stakeholder worse off under an RVO than they would have been under any other viable alternative? and

(d) does the consideration being paid for the debtor's business reflect the importance and value of the licenses and permits (or other intangible assets) being preserved under the RVO structure?

36. While this Court has cautioned that RVOs should not be the "norm" in restructurings, and should not be used merely because of convenience, they can be an appropriate way for a debtor to sell its business as a going concern where circumstances justify such a structure.[40]

37. In the CCAA proceedings of *Just Energy Group Inc. et. al.*, Justice McEwen followed a two-step analysis when considering whether to approve a sale transaction that was structured as a RVO:[41]

(a) First, whether the RVO was *prima facie* appropriate for use in the case at hand; and

(b) Second, whether the s. 36/*Soundair* factors supported the sale transaction generally.

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[38] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38.
[39] *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para 38.
[40] *Re Harte Gold Corp*., 2022 ONSC 653, paras 31-32.
[41] *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354, para 27.

38. In *Just Energy*, Justice McEwen noted that courts have approved reverse vesting orders in circumstances where, among others, "the debtor is a party to certain key agreements that would be similarly difficult or impossible to assign to a purchaser", and "where maintaining the existing legal entities would preserve certain tax attributes that would otherwise be lost in a traditional vesting order transaction".[42]

39. In *Re Plant-Based Investment Corp*. Justice Conway approved an RVO for the purpose of maintaining a debtor's corporate status, in that case as an investment corporation, and maintaining material tax attributes.[43] Justice Conway held those objectives satisfied the criteria set out in *Just Energy* and *Harte Gold*.

40. Similarly, in *Re Swarmio*[44] Justice Cavanagh approved an RVO for the purpose of ensuring an efficient operational transition of the debtors' assets and business. In that case the assets and business largely consisted of tax losses and material customer contracts governed by foreign law that would have been onerous to assign by court order.[45]

41. This case fits squarely within the pattern of circumstances where an RVO is appropriate:

(a) *The RVO is necessary*.

(i) The Applicants' tax losses can only be preserved within a reverse-vesting transaction and cannot be preserved within an asset transaction.[46] These tax losses are in excess of $39 million;[47]

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[42] *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.*, 2022 ONSC 6354 at para 34.
[43] *Re Plant-Based Investment Corp*., Endorsement of Justice Conway, August 17, 2023 at para 4 [Tab X].
[44] *Re Swarmio Media Holdings Inc. et al*., Endorsement of Justice Cavanagh, August 25, 2023 [Tab X].
[45] *Ibid*.
[46] Fifth Ripshtein Affidavit at para 54, Tab 2 of the Motion Record.
[47] Fifth Ripshtein Affidavit at para 54, Tab 2 of the Motion Record.

(ii) Humble Parent's status as a reporting issuer can only be maintained in a reverse-vesting transaction and cannot be preserved within an asset transaction.[48] The process to become a reporting issuer takes significant time and expense, and so maintaining reporting issuer status provides real value to the Purchaser;[49]

(iii) The Applicants must remain owners of their minority interest in HC Solutions Holdings, Inc. (the "**HCS Minority Interest**") to avoid triggering change of control provisions. The HCSHI Minority Interest is a valuable downstream foreign investment;[50] and

(iv) The Applicants are counterparties to domestic and foreign supply and distribution contracts that can only be conveyed with the consent of the non-assigning counterparty. A reverse-vesting transaction is necessary to avoid the expense and risk involved in seeking consent for assignment or seeking an assignment order.[51]

(b) *The RVO produces an economic result at least as favourable as any other viable alternative*. The proposed Transactions will preserve going-concern value, employee jobs and associated economic activity, including important supply and distribution relationships.[52] There is no viable alternative to the proposed Transactions. The only

[48] Fifth Ripshtein Affidavit at para 54, Tab 2 of the Motion Record.
[49] Monitor's Second Report at para 31(c).
[50] Fifth Ripshtein Affidavit at para 53, Tab 2 of the Motion Record.
[51] Fifth Ripshtein Affidavit at para 49-51, Tab 2 of the Motion Record.
[52] Monitor's Second Report at para 35.

alternative to an RVO is a bankruptcy, which would likely not yield a better outcome than the proposed Transactions.[53]

(c) *No stakeholder is worse off under the RVO structure than under a viable alternative*. There is no viable alternative to the proposed Transactions. The Stalking Horse Bid was the only offer received in the SISP for a going concern sale of the Applicants' businesses.[54] No stakeholders are in a worse position than they would otherwise be.

(d) The consideration provided by the acquirer reflects the importance and value of the assets being preserved. The Purchase Price was generated through a broadly supported and Court approved SISP implemented by the Monitor, and represents the highest possible consideration that a potential acquirer was willing to pay. The Applicants and the Monitor made good faith efforts to market the Applicants' business and assets to achieve the highest possible price. The Stalking Horse Bid represents the best outcome and was the only Qualified Bid received in the SISP.[55]

B. Releases Should be Approved

42. The Applicants submit that the Releases provided for in article 6.2 of the Purchase Agreement in favour of the Released Parties should be granted.

43. Section 5.1 of the CCAA provides authority to approve limited releases in favour of directors. As noted by the Court of Appeal for Ontario, the policy rationale behind section 5.1 of the CCAA is to encourage directors of an insolvent corporation to remain in office

[53] Monitor's Second Report at para 27.
[54] Monitor's Second Report at para 36.
[55] Monitor's Second Report at para 29.

during a restructuring rather than immediately resign.[56]

44. The language of section 5.1 of the CCAA is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.[57]

45. Third parties may be released in a proceeding if the releases are reasonably connected to the proposed restructuring, and the releases facilitate the successful completion of the plan.[58] Courts have approved releases in favour of third parties in the absence of a plan of compromise or arrangement, both on consent and in contested matters.[59] Third party releases have also been granted in reverse vesting order transactions.[60]

46. When determining whether it is appropriate to grant such releases under section 11 of the CCAA courts have drawn on the well-established factors for approving releases under plans of compromise or arrangement.[61] When modified in cases where there is no plan of compromise or arrangement, these factors include:[62]

(a) whether the claims to be released are rationally connected to the restructuring;

(b) whether the restructuring can succeed without the releases;

(c) whether the parties to be released contributed to the restructuring;

(d) whether the releases benefit the debtor as well as its creditors generally;

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[56] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para 99.
[57] *Green Relief Inc. (Re)*, 2020 ONSC 6837 at para 25.
[58] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54.
[59] See, for example, CCAA Termination Order in the Matter of *Golf Town Canada Holdings Inc. et al*, dated March 29, 2018, Toronto, Court File No. CV-16-11527-00CL (ONSC).
[60] See, for example, Approval and Vesting Order, in the Matter of *Wayland Group Corp. et al*, dated April 21, 2020, Toronto, Court File No. CV-19-00632079-00CL (ONSC).
[61] See, for example: *Re Metcalfe & Mansfield Alternative investments II Corp.*, 2008 ONCA 587.
[62] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54; *Re Green Relief*, 2020 ONSC 6837 at para 27.

(e) whether the debtor's creditors have knowledge of the nature and effect of the releases; and

(f) whether the releases are fair, reasonable and not overly-broad.

47. No one factor is determinative.[63] It is not necessary for all criteria to apply for a release to be granted and some factors may assume greater weight in one case than another.[64]

48. Applied here, the factors support the proposed Releases:

(a) The Released Parties have made material contributions to this restructuring. Among other things, the director and officers have:[65]

(i) maintained key customer and joint venture relationships during the CCAA process to ensure that such parties remained aligned with and committed to the Applicants continuity of business and emergence from restructuring;

(ii) negotiated the Purchase Agreement (including the Stalking Horse Bid features) within the SISP for the purpose of ensuring that the sales process proceeded in as stable, efficient and productive manner as was possible; and

(iii) provided important direction leading up to and throughout the filing and administration of the CCAA proceedings. As a result of the Directors and Officers' guidance, the Applicants will be emerging from these CCAA proceedings as a going concern.

(b) The Releases are a condition precedent to the closing of the Transactions and are

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[63] *Lydian International Limited (Re)*, 2020 ONSC 4006 at para 54.
[64] *Re Green Relief Inc.*, 2020 ONSC 6837 at para 28; *Re Harte Gold Corp*, 2022 ONSC 653 at para 80.
[65] Fifth Ripshtein Affidavit at para 62-63, Tab 2 of the Motion Record.

critical to the consummation of the Transactions;[66]

(c) The Releases are necessary to bring finality to these CCAA proceedings and facilitate the release of the Court-ordered charges;[67]

(d) The Releases were disclosed in the Applicants' motion materials served on the service list in advance of this motion;

(e) the Monitor supports the granting of the Releases on the basis, among other things, that the releases are proportionate given the beneficial contributions of the directors and officers to the CCAA proceeding;[68] and

(f) The Releases are fair, reasonable and not overly-broad; the terms of the Releases being proposed follow the limitations imposed by the CCAA, and would not extend to any claims against directors and officers based on allegations of misrepresentations made by directors to creditors, or of wrongful and oppressive conduct by directors.

C. ResidualCo should be added as an Applicant

49. The Transactions require adding ResidualCo to these CCAA Proceedings.[69]

50. ResidualCo is a corporation that will be incorporated under the federal laws of Canada. Immediately after the Excluded Assets and Excluded Liabilities are transferred to ResidualCo, ResidualCo will be balance sheet insolvent and the claims against ResidualCo will be in excess of the statutory threshold of $5 million.[70]

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[66] Fifth Ripshtein Affidavit at para 61, Tab 2 of the Motion Record.
[67] Monitor's Second Report para 55.
[68] Monitor's Second Report para 58.
[69] Fifth Ripshtein Affidavit at para 43 & 47, Tab 2 of the Motion Record.
[70] See the First Ripshtein Affidavit, paras 84, 93, and 98. The Applicants' liabilities, less the Secured Debt being assumed by the Purchaser, totals approximately $9,165,860.

D. Granting the Monitor Enhanced Power

51. The Applicants are seeking an order expanding the powers of the Monitor to, among other things, take all steps necessary to wind down, dissolve and/or bankrupt ResidualCo and administer the Excluded Assets and Excluded Liabilities. This relief is intended to facilitate the RVO structure. Similar relief has been granted in other RVO cases.[71]

52. The Monitor has the experience necessary to oversee ResidualCo and it is appropriate to expand the powers of the Monitor in order to complete these CCAA Proceedings.

E. Sealing the Confidential Appendix

53. The Applicants ask that the confidential appendices to the Monitor's Second Report be sealed. The Court may seal confidential documents under section 137(2) of the *Courts of Justice Act* (the "**CJA**").[72] Section 137(2) of the CJA provides "a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record."

54. In *Sherman Estate v. Donovan*, the Supreme Court of Canada established a three-part test for a sealing order: [73]

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

55. Citing *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of

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[71] *Just Energy*, paras 2, 24 and 101; *Harte Gold*, paras 91-93.
[72] *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137.
[73] *Sherman Estate v Donavan*, 2021 SCC 25 at para 38 **[*Sherman Estate*]**.

Canada reasoned in *Sherman Estate* that a general commercial interest in preserving confidential information is an important interest because of its public character.[74]

56. Here, the important public interest to be protected is the ability for companies in an insolvency proceeding to protect the economic interests of stakeholders by keeping summaries of bids submitted in a SISP confidential until the transaction closes. This is important because if the information were to become public it would harm a further sale process in the event the proposed Transaction does not close.

57. The sealing order sought is narrow, proportional, and time limited. The Applicants are only seeking to seal the confidential appendices from the public record pending a closing of the Transaction or until further order of the Court. The Monitor is supportive of this relief.[75]

F. Wage Earner's Protection Plan

58. The Applicants anticipate that Humble Parent will terminate employees on March 6, 2024. Some of these employees may be retained by the other Applicants or related companies.[76]

59. To the extent that any employees are not retained (the "**Terminated Employees**"), the Applicants intend to pay the Terminated Employees all wages, commissions and vacation pay owing up to and including March 6, 2024. However, the Applicants will be unable to pay any termination or severance pay. As a result, the Applicants seek a declaration, pursuant to section 5(5) of the WEPPA, that the Terminated Employees meet the criteria prescribed by subsection 3.2 of the WEPP Regulation.

60. Subsection 3.2 of the WEPP Regulation states that "a court may determine whether the

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[74] *Sherman Estate* at para 41.
[75] Monitor's Second Report at para 20.
[76] Fifth Ripshtein Affidavit at para 71, Tab 2 of the Motion Record.

former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations."[77]

61. Humble Parent's employees will have been terminated as of March 6, 2024 and Humble Parent will no longer have any business operations. As a result, the Applicants respectfully request that this Court grant a declaration that Humble Parent and the Terminated Employees meet the criteria established by section 3.2 of the WEPP Regulation, and are individuals to whom the WEPPA applies as of March 6, 2024.

G. Approval of the Monitor's Fees and Activities

62. As a component of the Termination Order, the Applicants are seeking the approval of the Monitor's activities as detailed in the First Report and the Second Report. The Applicants further seek approval of (a) the fees and disbursements of the Monitor and counsel to the Monitor that have been incurred; and (b) the fees and disbursements of the Monitor and counsel to the Monitor that will be incurred in performance of the duties of the Monitor up to the termination of the CCAA proceedings.

63. In *Target Canada*, the Court noted that there are good policy and practical reasons to grant the approval of a monitor's reported activities, including (a) allowing a monitor to bring its activities before a court; (b) allowing an opportunity for stakeholders' concerns to be addressed; (c) enabling a court to satisfy itself that a monitor's activities have been conducted in a prudent and diligent manner; (d) providing protection for a monitor not otherwise provided by the CCAA; and (e) protecting creditors from delay that may be caused by re-litigation of steps or potential indemnity claims by a monitor.[78]

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[77] *Wage Earner Protection Program Regulations*, SOR/2008-222, s. 3.2.
[78] *Re Target Canada Co.* 2015 ONSC 7574, at paras 2, 22-23, Tab 20 [*Target Canada*].

64. The activities of the Monitor and its counsel that are set out in the First Report and the Second Report were necessary, consistent with the Monitor's duties and powers as set out in the CCAA, and were undertaken with efficiency and reasonableness in the interests of the Applicants' stakeholders generally.

65. Pursuant to paragraph 27 of the Second Amended and Restated Initial Order, the Monitor and its counsel are to be paid their reasonable fees and disbursements at their standard rates and charges as part of the costs of the CCAA Proceedings. Pursuant to paragraph 28 of the Second Amended and Restated Initial Order, the Monitor and its counsel shall pass their accounts from time to time.

66. In approving the fees and disbursements of the Monitor and its counsel, the Court must balance whether "the monitor [and its counsel] is fairly compensated while safeguarding the efficiency and integrity of the CCAA process."[79]

67. The Monitor devoted significant time to facilitating and implementing a successful SISP in accordance with the SISP Approval Order.

68. The Applicants submit that the fees and disbursements of the Monitor and its counsel, including future fees and disbursements, are fair, reasonable and commensurate with the size and complexity of the CCAA proceedings, and are comparable to the rates charged by other professional firms in the Toronto market for the provision of similar services.[80]

69. In light of the foregoing, the Applicants support the approval of the fees and disbursements of the Monitor and its counsel, and such fees and disbursements should be approved.

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[79] *Nortel Networks Corp. et al. (Re)*, 2017 ONSC 673 at para 13 (citing *Winalta Inc. (Re)*, 2011 ABQB 399 at para. 30).
[80] Monitor's Second Report at para 47.

H. Termination of these CCAA Proceedings

70. Following completion of the remaining activities, as described in the Monitor's Second Report, these CCAA proceedings will be substantially complete. At such time, the Applicants are seeking to terminate these CCAA proceedings.

71. Upon service and filing of the Discharge Certificate, the Monitor will have completed its responsibilities as Monitor in these CCAA proceedings.

72. The Applicants request the discharge of all court-ordered priority charges effective as of the filing of the Discharge Certificate, including (all as defined in the Second Amended and Restated Initial Order) (i) the Administration Charge; (ii) the Directors' Charge; and (iii) the DIP Lender's Charge.

PART V - RELIEF REQUESTED

73. The Applicants respectfully request that this Honourable Court grant the relief provided for in the proposed Approval and Vesting Order, the BOB Approval and Vesting Order, and in the Termination Order in accordance with the terms of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of March, 2024.

MILLER THOMSON LLP
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587
2. *Green Relief Inc. (Re)*, 2020 ONSC 6837
3. *Golf Town Canada Holdings Inc et al*, CCAA Termination Order dated March 29, 2018, Court File No. CV-16-11527-00CL (ONSC)
4. *Harte Gold Corp. (Re)*, 2022 ONSC 653
5. *Just Energy Group Inc et al v Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354
6. *Lydian International Limited (Re)*, 2020 ONSC 4006
7. *Nortel Networks Corp, Re*, [2009] OJ No. 3169
8. *Nortel Networks Corp. et al. (Re)*, 2017 ONSC 673
9. *Re Canadian Red Cross Society/Society canadienne de la Croix-Rouge*, [1998] OJ No. 3306
10. *Re Just Energy Group Inc.*, et al., 2022 ONSC 6354
11. *Re Metcalfe & Mansfield Alternative investments II Corp.,* 2008 ONCA 587
12. *Re Plant-Based Investment Corp*, Endorsement of Justice Conway, August 17, 2023 [Tab X]
13. *Re Swarmio Media Holdings Inc et al*, Endorsement of Justice Cavanagh, August 25, 2023 [Tab X]
14. *Re Target Canada Co,* 2015 ONSC 7574
15. *Royal Bank of Canada v Soundair Corp*., [1991] O.J. No. 1137, 4 OR (3d) 1
16. *Sherman Estate v Donavan*, 2021 SCC 25
17. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.,* 2019 ONCA 508
18. *Wayland Group Corp et al*, Approval and Vesting Order dated April 21, 2020, Court File No. CV-19-00632079-00CL (ONSC)

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, RSC 1985, c C-36,

Claims against directors — compromise

5.1 (1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

General power of court
11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — other than initial application
11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application
11.02(3) The court shall not make the order unless
(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Interim financing
11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Factors to be considered
11.2(4) In deciding whether to make an order, the court is to consider, among other things,
(a) the period during which the company is expected to be subject to proceedings under this Act;
(b) how the company's business and financial affairs are to be managed during the proceedings;
(c) whether the company's management has the confidence of its major creditors;
(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(e) the nature and value of the company's property;
(f) whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) the monitor's report referred to in paragraph 23(1)(b), if any

Security or charge relating to director's indemnification
11.51 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority
11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance
11.51(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault
11.51(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion

the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Factors to be considered
36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
> **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> **(d)** the extent to which the creditors were consulted;
> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Restriction on disposition of business assets
36(1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Factors to be considered
36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

> **(a)** whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> **(b)** whether the monitor approved the process leading to the proposed sale or disposition;
> **(c)** whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> **(d)** the extent to which the creditors were consulted;
> **(e)** the effects of the proposed sale or disposition on the creditors and other interested parties; and
> **(f)** whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Courts of Justice Act, RSO 1990, c C.43,

Vesting Orders
100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

Documents public
137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

***Wage Earner Protection Program Act*, SC 2005, c 47, s 1**

Interpretation

Definitions

- **2 (1)** The following definitions apply in this Act.

eligible wages means

- **(a)** wages other than termination pay and severance pay that were earned during the longer of the following periods:
    - **(i)** the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer,
    - **(ii)** the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:
        - **(A)** the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,
        - **(B)** the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

- **(iii)** the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):
    - **(A)** the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,
    - **(B)** the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

- **(b)** termination pay and severance pay that relate to employment that ended
    - **(i)** during the period referred to in paragraph (a), or
    - **(ii)** during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

Eligibility for Payments

Conditions of eligibility

- **5 (1)** An individual is eligible to receive a payment if
    - **(a)** the individual's employment ended for a reason prescribed by regulation;
    - **(b)** one of the following applies:
        - **(i)** the former employer is bankrupt,
        - **(ii)** the former employer is subject to a receivership,
        - **(iii)** the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and
            - **(A)** the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and
            - **(B)** a trustee is appointed, or

- **(iv)** the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

- **(c)** the individual is owed eligible wages by the former employer.
- **(d)** [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — other proceedings

5(5) On application by any person, a court may, in proceedings under Division I of Part III of the Bankruptcy and Insolvency Act or under the Companies' Creditors Arrangement Act, determine that the former employer meets the criteria prescribed by regulation.

***Wage Earner Protection Program Regulations*, SOR/2008-222**

Proceedings Under Bankruptcy and Insolvency Act or Companies' Creditors Arrangement Act

3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUMBLE & FUME INC. ET AL

Court File No.: CV-24-00712366-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at TORONTO

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